

Interest Analysis: A Continental Perspective

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I am much indebted for the invitation to speak at this gathering of distinguished American conflicts teachers. The only authorization for my doing so might perhaps be that I belong to those continental lawyers who, since the Sixties, turned their attention to what afterwards has been termed the American conflicts revolution. After having taught a generation of European law students the Europe-based traditionalist school of conflicts thinking, I expressed my reaction towards the most radical of the new American ideas through violent diatribes.¹

Since then, the scenery has undergone important changes. The proposed new methods of conflicts solutions have found impressive adherence in the American academic milieu and have broadly penetrated the thinking and language, if not equally the decision making, of the state and federal judicial machinery. At the same time, a mounting theoretical criticism is directed at those methods, while their application both in the courtroom and in the academic laboratory is making more and more possible a closer definition of their limits.

The time I have at my disposal allows but a few brief comments on a huge, complex, and highly controversial subject. I will be selective and try to deal with some aspects of it, hopefully those which a continental lawyer would be expected to look for in this debate.

I will begin with some assumptions. First, the choice of law method I am referring to is the interest analysis as proposed by Brainerd Currie and endorsed by his disciples. I am aware that this statement needs further precision. What I consider as the defining characteristic of this method is the search for the applicable law through the identification of legislative interests pointing at the spatial reach of the substantive rules of the jurisdictions concerned and extracted by construction of those rules. I will not deal with other contemporary American propositions based on various choice of law principles or considerations of broad, soft, open-ended conflicts rules.

Second, it is assumed that interest analysis, although initially and perhaps still proposed as an ecumenical choice of law method, has been in practice confined to certain areas, particularly torts and related fields.

Third, I will not express views on the rationality, sufficiency, or efficiency of interest analysis as a choice of law method in interstate conflicts within the American federation. I feel neither equipped nor willing to take part in this exciting family feud which has developed into a fierce exchange of argument with the use of a much harder vocabulary than its continental counterpart.

I think that a non-American lawyer would be entitled to look critically at the American conflicts propositions, whatever they may be, from at least two points of

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1. D. EVRIGENIS, *ESSAYS IN HONOUR OF WILHELM WENGLER* 269 (1973); Evrigenis, *Tendances Doctrinales Actuelles en Droit International Privé* 118 *RECUEIL DES COURS* 319 (1966); Evrigenis, Book Review, 18 *Revue Hellenique de Droit International* 471 (1965).

view: first, interest analysis is advanced not as an American but as a universal method of choice of law; and, second, interest analysis is used as a choice of law method in international conflicts. I shall address these two points briefly.

Can interest analysis be the basis of a universal conception of the law of conflict of laws? My answer is no. This technique is neither practicable nor desirable for solving international conflicts issues.

It is not practicable because inviting even the most learned judge to identify spatially operating interests actually or purportedly underlying the substantive rules of foreign countries connected with the case would not be only inhuman but illusory. The impracticability of such an exercise would be tremendously enhanced if the substantive rules-spatial reach test had to be undertaken in a forum that had mandatory choice of law principles of any kind, judicial notice of foreign law, and granted remedy for erroneous application or misinterpretation of foreign law.

It is undesirable as an expression of choice of law legislative policy because it does not leave room for a genuine consideration of foreign interests and leads to an almost inflexible and inescapable homotrend. Neither judicial experience nor academic inventiveness offers convincing international conflicts examples of an interest analysis being something substantially different from a disregard or, in the best case, a domestic reconstruction of foreign legislative policies. But even on this last assumption interest analysis does not seem to take account sufficiently of these domesticated foreign interests for choice of law purposes. If one can expect that a conflict of interests between the forum and a foreign country will be solved, as a matter of principle, in favor of the forum law, one would hardly see room for a real balancing of interests in other terms for a choice of law principled system. The very concept of true conflict seems to fall logically apart. In its orthodox version, interest analysis is immune to considerations related to international intercourse and to domestic interests as they are projected into the international economic and social environment.

Such a conclusion already contains the answer to the second question I wish to address. The question is: Can interest analysis serve as the basis for rational and legitimate American—or any other national—solutions of international conflicts of law? My answer again would be no. Certainly, every national jurisdiction enjoys, under international law, a wide freedom in determining the spatial reach of its own law, either by interest analysis or through traditional conflicts devices. Probably it enjoys a larger freedom than the permissive definition of constitutional choice of law limitations, as stated in *Allstate Insurance Co. v. Hague*,² ascribes to a state within the American Federation. But the problem, as I see it in the framework of this debate, is a different one. It is whether a state member of the international community can rightly respond to the quest of applicable law in international conflicts cases by adopting a methodology which consists, by definition, of an aggressive unilateralist approach and can virtually produce solutions that are inherently indifferent to considerations dictated by an actually growing and politically desirable social,

2. 449 U.S. 302 (1981).

economic, and cultural intercourse among the nations. This may be, and probably is, a choice of law conception that many national legislators would feel free and inclined to espouse. The question is whether it represents an international conflicts choice of law philosophy that should be advanced in an academic discussion, as scholarly advice to the legislator, or as a pattern of behavior in an international legislative drafting setting such as The Hague Conference on Private International Law. Seen from this angle, the debate on interest analysis cannot be reduced to an exchange of argument over methods and techniques. It is a political issue. And I believe this aspect of the question has been, perhaps surprisingly, neglected in an otherwise thorough and sometimes prolific discussion.

Consider, for example, the line of thought in the *Paris Air Crash*³ case. One cannot criticize the decision for applying the law of the California manufacturer's residence. But a European lawyer would be skeptical of some of the reasons given and, in particular, of direct decisional references to cases like *Challoner v. Day and Zimmermann, Inc.*⁴ and *Greenman v. Yuba Power Products, Inc.*⁵ These cases express an almost inflexible primacy of national governmental interests in international cases involving tort liability and victims' or survivors' compensation.

Does interest analysis, as applied in typical conflicts situations, reflect, suggest, or confirm patterns of legal behavior practiced in other politically sensitive fields such as the extraterritorial reach of antitrust or export administration legislation? This is a question that I would like to formulate in this Symposium. The answer to it may cast an additional light on our subject and perhaps water down, if not invalidate, some political value judgments which are the secret basis of certain analyst tendencies. This brings me to my final random comments.

The contemporary European conflicts law is open to new methods as can be seen from the European Economic Community Convention on the Law Applicable to Contractual Obligations, as well as from some of the recent Hague conventions and national codifications. One can find in these texts hard and fast, but also broad, flexible, and open-ended rules. One can also find selective results favoring plaintiffs, issue by issue analysis, and, of course, a certain presence of policy interest analysis in its European version expressed through the concept of *regles d'application immediate*. The whole system might appear complicated, sometimes sophisticated, inappropriately eclectic in the eyes of an American conflicts lawyer. It is. Yet the system is inspired, as a whole, by considerations expressing a real concern for "multistate policies as such,"⁶ or for the "maintenance of interstate and international order,"⁷ or for "accommodations between nations . . ." in "a growing sense of world Community."⁸ Europeans do not pretend to save the world with such a choice

3. *Paris Air Crash* of March 3, 1974, 399 F. Supp. 732 (C.D. Cal. 1975).

4. 512 F.2d 77 (5th Cir. 1975), *vacated* 423 U.S. 3 (1975).

5. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962).

6. A. VON MEHREN AND D. TRAUTMAN, *CASES AND MATERIALS ON CONFLICT OF LAWS* 76 (1965).

7. R. LEFLAR, *AMERICAN CONFLICTS LAW* 195 (3d ed. 1977); *see also* *RESTATEMENT (SECOND) CONFLICT OF LAWS* § 145 (2)(a) (1971).

8. D. CAVERS, *THE CHOICE OF LAW PROCESS* 119 n.6 (1965).

of law system. But we are reasonably satisfied with it and try to improve it constantly without a spirit of exclusiveness and dogmatism.

I would, nevertheless, like to finish with some words mixing criticism with praise for interest analysis. This legal theory should be praised not only for having given back to the law of conflict of laws all its fun as an intellectual game; not only for having made of it again a field of cruel battle both in semantics and value judgments on spiritual morality; and not only for having transformed the courts into adventure playgrounds to the extreme joy of imaginative judges and lawyers. Interest analysis should also be praised for a very serious reason which is its major, if not its only substantial, contribution to our subject matter. This reason is that choice of substantive laws supposes a thorough, profound, and teleological (interest oriented) analysis of the substantive law institutions to be spatially arranged. But there stop the achievements and perspectives of the method. In the analysts' reasoning, there is hardly room for a vision of a federation or of an international community, for with some brilliant exceptions, there is neither historic foundation nor comparative law background. For the more radical interest analysts, the substantive law analysis stops halfway, in a state of unfinished maturation and undecided whether or not to proceed to the search and formulation of choice of law rules or principles. For the outside observer, interest analysis seems to be working in a rather limited area of law and social life. It is working with some totemized legislative policy concepts and cohabitating peacefully and constructively, both in the textbooks and the judicial decisions, with a lot of traditional, territorial, and blackletter conflicts rules.

To my learned American colleagues, *la fleur* of the American conflicts thinking, I say: Less battlecries, less celebration of worn out victories, less exclusiveness in methods, more pragmatism, more realism regarding the tools proposed, more federalism and internationalism. Is all that not the very spirit of American law?

To Brainerd Currie: A Fallen Giant

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Brainerd Currie once remarked that Walter Wheeler Cook “discredited the vested-rights theory as thoroughly as the intellect of one man can ever discredit the intellectual product of another.”¹ Now Professor Lea Brilmayer has done the same thing.² By lucidly exposing the obfuscations that inhere within interest analysis, she has performed a consummate act of “trashing” that rivals the finest works of the most gifted critical legal scholars.³

However, what has Brilmayer’s trashing achieved? To jettison legal rules and theories merely because they will not withstand critical analysis would leave us in a state of anarchy. The issue is not whether Currie’s view satisfies our sense of logic; rather, to utilize Professor Robert Sedler’s variation of the classic Holmesian cliché, the issue is whether experience has shown interest analysis to be a workable theory.⁴

Professor Brilmayer accurately asserts that interest analysis, both in theory and in practice, is “pro-resident, pro-forum, and pro-recovery.”⁵ She and other critics of interest analysis appear to have four objections to a “pro-resident, pro-forum, and pro-recovery” jurisprudence.

The first objection is that parochialism violates the Constitution. The parochialism that results from a reductionist extension of Currie’s theory might, on occasion, violate constitutional limitations that inhere in our federal system. However, these limitations need considerable refinement before they stand as an indictment of interest analysis. First, the privileges and immunities clause does not protect corporate defendants from this exercise of parochialism.⁶ A “pro-resident, pro-forum, and pro-recovery”⁷ bias in cases where injured individuals sue corporations that are able to spread the costs should not run afoul of the fourteenth amendment’s minimal rationality test.⁸

Most cases involving the apparent disparate treatment of individuals that implicate constitutional norms arise in situations like the unprovided-for case when the forum refuses to apply its rules against its own domiciliaries unless the domicile of the nonforum party would do the same.⁹ Putting the Constitution aside, one should ask, as a commonsensical matter, what great injustice has a New York court wrought

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1. B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 6 (1963).

2. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392 (1980); Brilmayer, *Methods and Objective in Conflict of Laws: A Challenge*, 35 MERCER L. REV. 555 (1984); Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OHIO ST. L.J. 459 (1985).

3. See Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984).

4. Sedler, *Interest Analysis as the Preferred Approach to Choice of Law: A Response to Professor Brilmayer’s “Foundational Attack,”* 46 OHIO ST. L.J. 483 (1985).

5. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 398.

6. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869).

7. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 398.

8. See *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

9. See Ely, *Choice of Law and the State’s Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 186–87 (1981).

when it refuses to permit an individual Ontario plaintiff to recover from a New York domiciliary when Ontario would not allow recovery?¹⁰

Professor Brilmayer inappropriately relies on *Baldwin v. Seelig*¹¹ for the existence of a per se rule preventing states from adopting "pro-resident, pro-forum, pro-recovery" rules that will line the pockets of their constituents.¹² Only those parochial rules that unduly burden interstate commerce run afoul of the commerce clause.¹³ If a court or legislature adopts such a burdensome choice of law rule then it should be struck down in the same manner as any other legislative or judicial act that threatens federal interests. In actual practice, I have seen very few choice of law rules where, to borrow from Justice Cardozo's language in *Baldwin*, "the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation."¹⁴

The second objection to a "pro-resident, pro-forum, and pro-recovery" jurisprudence cites the needs of interstate and international systems. The reporters for the Second Restatement of the Law of Conflict of Laws concluded that "the smooth functioning of the interstate and international systems in private law matters should be the basic consideration in the decision of every choice of law case."¹⁵ These multilateral themes formed the basis of Professor Evrigenis' measured critique of interest analysis.¹⁶

Currie's brand of interest analysis does nothing to further the needs of interstate and international systems. However, only in rare situations would the application of Currie's ideas undermine these systemic needs. As a practical matter, choice of law rules only endanger international and national systems when these rules defeat the reasonable expectations of parties or invite destructive retaliation. Few tort cases pose such issues, and most contracts that would rise to this level of importance contain choice of law provisions that most jurisdictions willingly enforce. Thus, the potential disruptions of these systems occur only in the rare case where a court, consistent with Currie's views, disregards such choice of law selection provisions. In these situations, thoughtful judges who generally sympathize with Currie's approach appropriately reject it.¹⁷

Even when courts employ interest analysis to destroy the legitimate expectations of parties, such as Oregon's application of its spendthrift law to nullify a loan made in California by a California domiciliary to an Oregon domiciliary,¹⁸ one still will find, as the reporters to the Second Restatement of the Law of Conflict of Laws candidly admitted, "[I]t is well-nigh impossible to determine whether the needs of the

10. See *Tooker v. Lopez*, 24 N.Y.2d 569, 249 N.E.2d 394, 301 N.Y.S.2d 519 (1969). *Neumeier v. Kuehner*, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

11. 294 U.S. 511 (1935).

12. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 416.

13. *Baldwin v. Seelig*, 294 U.S. 511, 522 (1935).

14. *Id.*

15. Cheatham & Reese, *Choice of the Applicable Law*, 52 COLUM. L. REV. 959, 962 (1952).

16. Evrigenis, *Interest Analysis From a Continental Perspective*, 46 OHIO ST. L.J. 525 (1985).

17. Compare Justice Burger's majority opinion in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) with his joining of Justice Powell's dissenting opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 332 (1981).

18. *Lilienthal v. Kaufman*, 239 Or. 1, 395 P.2d 543 (1964).

interstate or international system would best be served by the resolution of a given dispute one way or the other."¹⁹

The third objection to a "pro-resident, pro-forum, and pro-recovery" jurisprudence is that it causes a lack of predictability that leads to inefficient conduct. In her seminal piece, Professor Brilmayer argues that lack of predictability where the statute regulates conduct is the evil to be remedied.²⁰ She posits the case of a lawn mower manufacturer who complies with the forum law requiring a protective shield. However, since these shields are expensive, the manufacturer, a nonresident of the forum, only installs them on units sold in the forum state. The plaintiff, a forum resident, is injured by an unshielded lawn mower which was sold and used in a state that does not require shields. Brilmayer plausibly argues that Currie's interest analysis might lead the forum to impose liability.²¹ She then concludes that "[r]egulations that are applied on an unpredictable basis impose costs that cannot be justified by social necessity, since by hypothesis they discourage conduct needlessly. The additional cost of lawnmower safety shields illustrates this inefficiency."²²

This argument misstates the common understanding of efficiency. Let us not forget that failure to engage in this needless conduct resulted in an injury for which someone must bear the cost. No manufacturer will install extra shields on the mere possibility of such a rare occurrence; rather they will insure against such eventualities. In fact, the only issue is whether the defendant's casualty insurer pays, the plaintiff and his insurers pay, or the state of the plaintiff's domicile pays for the injury. This choice does not implicate efficiency concerns unless Professor Brilmayer believes that the victim should have altered his conduct to have minimized the risk of injury.²³

The fourth objection to a "pro-resident, pro-forum, and pro-recovery" jurisprudence is that it leads to forum shopping.²⁴ Yet except for helping injured plaintiffs recover, she does not articulate an objection to forum shopping other than that it diminishes predictability which is a problem a simple insurance policy can readily solve.

Professor David Cavers, in a mythical judicial opinion reflecting the thinking of Erwin Griswold, predicted many of the problems resulting from expansive jurisdictional rules accompanied by unfettered choice of law theory:

Even after an injury of some sort has occurred, there is, under such a [non-lex loci] rule, no basis for advising a client as to his rights, or for settling or adjusting the dispute without litigation. All that the lawyer can say is, 'Well, it depends upon the state in which the suit is brought. We will have to see where we can serve the defendant, and then try to find the state where the prospects are best. Perhaps we should sue in three or four states, and then nurse the several cases along until we see how the precedents develop.'

19. Cheatham & Reese, *supra* note 15, at 963.

20. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 406.

21. *Id.* at 404-05.

22. *Id.* at 407.

23. See R. POSNER, *THE ECONOMIC ANALYSIS OF LAW* 72 (1973).

24. Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, *supra* note 2, at 399.

All this is fun for lawyers, and provides much for the law professors to write about. But it is not law.²⁵

This multiplicity of lawsuits creates inefficiency by increasing the transaction costs involved in resolving these disputes. However, note that interest analysis, standing alone, did not produce this inefficiency. Rather, amorphous jurisdictional rules,²⁶ procedural rules which do not require plaintiffs to state carefully their causes of action,²⁷ and a mercurial body of substantive tort law have potentiated with the kinetics of choice of law theory.

This attack on "pro-resident, pro-forum, and pro-recovery" policies has the practical effect of sacrificing individualized justice for the sake of predictability, efficiency, and multilateralism. To understand this contemporary ideological ritual that would leave many personal injury plaintiffs uncompensated, I suggest placing choice of law methodology within the broader context of other jurisprudential and intellectual movements.

The demise of the strict territorial theory and the rise of interest analysis occurred during a period when the Supreme Court, in bringing the *Lochner*²⁸ era to a close,²⁹ removed the fourteenth amendment proscriptions that had impeded the states' efforts to solve many of their social problems. The New Deal Court in *Alaska Packers Association v. Industrial Accident Commission*,³⁰ *Pacific Employers Insurance Co. v. Industrial Accident Commission*,³¹ and *Carroll v. Lanza*³² accompanied its evisceration of *Lochner* with a clear rejection of prior dicta suggesting that the fourteenth amendment and the full faith and credit clause incorporated the vested rights theory as a limitation on the solutions that states could employ in cases that arose in a multistate context.³³

Consistent with this spirit of anti-*Lochnerian* federalism, the Supreme Court decided *Erie Railroad v. Tompkins*³⁴ in 1938 and required federal district courts in diversity cases to use the substantive law of the state in which they sat. Three years later in *Klaxon Co. v. Stentor Electric Manufacturing Co.*,³⁵ the Court made clear that the rule in *Erie* applied equally to choice of law rules.

These two doctrinal shifts amounted to the prenatal constitutionalizing of the teachings of Currie. By 1941 a state could, with few exceptions, choose a rule to solve a social problem and apply its rule to a multistate transaction in which it had an interest irrespective of the strong interests of other jurisdictions. Yet this was a rather benign

25. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 23 (1965).

26. See *infra* text accompanying notes 37-44.

27. The Federal Rules of Civil Procedure, which permit pleading of bare bone facts, were adopted in 1938. 308 U.S. 645-766. Today, most states have adopted, with modifications, these rules.

28. *Lochner v. New York*, 198 U.S. 45 (1905) (holding that New York could not impose a maximum number of hours that bakers could work).

29. See G. GUNTHER, *CONSTITUTIONAL LAW*, 533-44 (10th ed. 1980).

30. 294 U.S. 532 (1935).

31. 306 U.S. 493 (1939).

32. 349 U.S. 408 (1955).

33. See *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932).

34. 304 U.S. 64 (1938).

35. 313 U.S. 487 (1941).

doctrinal mutation because most states still adhered to the territorial view and the Court had not yet sanctioned jurisdictional promiscuity.

By 1945, when the Supreme Court decided *International Shoe Co. v. Washington*,³⁶ jurisdictional rules which ostensibly required a state to base jurisdiction on actual power over the defendant or his property had spawned a number of Ptolemaic epicycles such as quasi in rem jurisdiction,³⁷ corporate "presence,"³⁸ and "implied consent."³⁹ Thus, *International Shoe*, which articulated a jurisdictional theory based on "reasonableness," "fair play," and "justice,"⁴⁰ rounded out the Court's post-*Lochnerian* jurisprudence. By 1957 the Supreme Court had, for all practical purposes, permitted states to exercise jurisdiction over, and to apply their law to, out-of-state defendants whose contacts with the forum were most attenuated.⁴¹

Many state courts responded to this new federalism by stretching jurisdictional principles to their limits and totally discarding any traditional notions of territoriality in choice of law theory. For example, New York, in *Seider v. Roth*,⁴² permitted a plaintiff to base jurisdiction over an out-of-state defendant by garnishing his insurer's obligation to defend. Since many insurers do business nationwide, this permitted New York to bring before its courts many individual defendants who had never had any dealings with New York.

New York abandoned the vested rights-territorial theory of choice of law, freeing itself to apply its own law to any transaction involving a New York domiciliary irrespective of the legitimate interests of other jurisdictions.⁴³ And, of course, *Klaxon* required that federal courts follow suit. *Rosenthal v. Warren*,⁴⁴ a case in which a federal district court in New York would not permit a Massachusetts physician to raise the Massachusetts wrongful death statute to limit damages in a medical malpractice case involving an operation that took place in Boston, has become a watershed from which to view a new jurisdictional and choice of law jurisprudence. Judge Lumbard's dissent, in apparent disregard of the Court's sweeping dictum in *Carroll v. Lanza*⁴⁵ and presaging themes that have appeared in recent scholarship, suggested that the application of New York law to an operation performed in Massachusetts would violate the full faith and credit clause.⁴⁶

Not surprisingly, our jurisprudence has retreated from the license of *Rosenthal*. Most legal movements, like other human endeavors, develop pendularly. It should come as no surprise that the vested rights-territorial theory of choice of law which was in vogue during the first half of the twentieth century differed substantially from

36. 326 U.S. 310 (1945).

37. *Harris v. Balk*, 198 U.S. 215 (1905).

38. *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (1930).

39. *Hess v. Pawloski*, 274 U.S. 352 (1927).

40. *International Shoe Co. v. Washington*, 326 U.S. 310, 322 (Black, J., dissenting).

41. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957).

42. 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966).

43. See *Miller v. Miller*, 22 N.Y.2d 12, 237 N.E.2d 877, 290 N.Y.S.2d 734 (1968); *Babcock v. Jackson*, 12 N.Y.2d 73, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963); *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

44. 342 F. Supp. 246 (S.D.N.Y. 1972), *aff'd*, 475 F.2d 438 (2d Cir. 1973).

45. 349 U.S. 408 (1955).

46. *Rosenthal v. Warren*, 475 F.2d 438, 448-49 (2d Cir. 1973) (Lumbard, J., dissenting).

choice of law theories propounded by Joseph Story during the first part of the nineteenth century.⁴⁷

Nor should one have ever expected the territorial view to last. It defied common sense to believe that judges would ignore the policies behind the laws they apply. However, legal theories rarely die with a bang; they expire with a whimper. The ability of the territorialists to recharacterize cases⁴⁸ or create exceptions⁴⁹ to their general rules in order to effectuate policies led to a system that surpassed the Ptolemaists for complexity and irrelevancy of prediction.

Brainerd Currie, a gifted doctrinal muckraker, did nothing more than carry the reasoning of Professor Cavers and other critics of the vested rights theory⁵⁰ to its logical extreme.⁵¹ If judges must examine policies behind rules before choosing to apply them, then why not limit such explorations solely to policies which would inevitably lead the forum to apply its law in furtherance of its domestic policies?⁵²

The legal establishment, believing that the society is crumbling under the pressure of incessant, protracted litigation which lines the pockets of lawyers,⁵³ has energized another oscillation. The Supreme Court has recently curtailed the power of states to exercise jurisdiction over nonresident defendants.⁵⁴ In 1981 three dissenting Justices urged modification of the rules that granted a state's broad license to apply its own law to any transaction with which it has contact.⁵⁵ And during this past term, the Court, with but one dissent, ended a five decade refusal to declare unconstitutional a forum state's application of forum law to a transaction over which the forum had jurisdiction.⁵⁶ The Court has modified doctrine to preclude relitigation of claims.⁵⁷ Also, the Supreme Court has approved modifications of our federal procedural rules to reduce the costs of dispute resolution.⁵⁸ Reformers incessantly propose substantive law reforms hoping that they will efficiently solve problems without resorting to costly litigation.⁵⁹

47. Compare J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS §§ 33-35 (2d ed. 1841), basing a forum's obligation to use foreign law on notions of comity, with RESTATEMENT OF CONFLICT OF LAWS § 6 1934, which totally rejects any notion of comity.

48. See, e.g., *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P.2d 944 (1953) (classifying survival of causes of action as procedural).

49. See, e.g., *Kilberg v. Northeast Airlines*, 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y. S.2d 133 (1961) (held that New York's public policy against wrongful death statutes sanctioned the application of New York law to an accident that occurred in Massachusetts).

50. See W. COOK, THE LOGICAL AND LEGAL BASIS OF THE CONFLICT OF LAWS (1942); E. LORENZEN, SELECTED ARTICLES ON CONFLICT OF LAWS (1947).

51. See B. CURRIE, *supra* note 1, at 79-80.

52. B. CURRIE, *supra* note 1, at 169.

53. For a fine review of the literature setting forth the theme that "we suffer from an excessive amount of disputing and of litigation . . .," see Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 6 (1983).

54. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Rush v. Savchuk*, 444 U.S. 320 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

55. *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981) (Powell, J., Burger, C.J., and Rehnquist, J., dissenting).

56. *Phillips Pet. Co. v. Shutts*, 53 U.S.L.W. 4879 (1985).

57. See, e.g., *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980).

58. See FED. R. CIV. P. 11, 16, 26 advisory committee notes.

59. The widespread adoption of no-fault automobile insurance reflects this concern, as does the growing use of panels to screen medical malpractice cases.

A new generation of reformers "have discovered" that "Currie was as metaphysical as Beale."⁶⁰ No doubt the highly malleable contours of Currie's metaphysics reflect the fact that most "[i]nterest analysts inject their own normative preferences into choice of law discussions."⁶¹ I suspect that Professor Sedler and other nonrevisionist defenders of interest analysis believe that the doctrine has worked because they share my political view that it is all right for judges to help out accident victims by shifting costs on to those who can easily insure. Also they would probably agree that rejecting interest analysis will not contribute much to a harmonious multilateralism or to a capping of the litigation gusher.

A change in the political climate, not flawed logic or awkward evolutionary deformities, have lessened the attraction of interest analyses. Unlike Beale, who wrote during the early decades of the twentieth century when judges generally "denied any lawmaking function . . .,"⁶² Currie wrote in the era of the late 1950's and early 1960's when judges and legal scholars legitimated a judicial activism that blurred the institutional differences between courts and legislatures.⁶³ Now, Professor Brilmayer and her contemporary critics of Currie's theories write from a perspective of failed judicial initiatives.⁶⁴

Until our nation adopts a comprehensive national social insurance system our choice of law theories will remain self-contradictory. The architects of the Second Restatement listed ten factors, in their order of importance, that should influence choice of law thinking. The greatest concern was furtherance of interstate and international interests, while attempts to achieve "justice in the individual case"⁶⁵ was of the least concern.

However, many judges just will not sacrifice "individual justice" for the party who appears before their courts to some greater abstraction, particularly since few cases raise systemic concerns because the parties have adequately protected themselves either by choice of law clauses or insurance. Unfortunately, this search for individualized justice invites the manipulation of rules that make it difficult to predict results on the basis of doctrine. The resulting doctrinal mosaic does rival Beale's territorialism for its Ptolemaic complexity. This "chaos," as Professor Cavers so artfully suggested,⁶⁶ engenders wasteful expenditures.

While engaging in their intellectual dissection, I urge Currie's detractors to remember that his theories often permitted courts to use rather humane and commonsensical approaches to the solutions of multistate problems. I pray that their intellectual coffins will be marked by similar epitaphs.

60. Brilmayer, *Methods and Objective in Conflict of Laws: A Challenge*, *supra* note 2, at 563.

61. *Id.* at 562.

62. G. WHITE, *THE AMERICAN JUDICIAL TRADITION* 149 (1976).

63. *See id.* at 295.

64. *See* Galanter, *supra* note 53, at 6 n.4.

65. Cheatham & Reese, *supra* note 15, at 981.

66. D. CAVERS, *supra* note 25.

